

COMMONWEALTH OF MASSACHUSETTS

IN THE MATTER OF

HEADWALL RECOVERY CORPORATION and  
MICHAEL R. HARKINS

) BROWNFIELDS COVENANT  
) NOT TO SUE AGREEMENT

) DEP RTN 3-20194  
)

I. STATEMENT OF PURPOSE

A. This Brownfields Covenant Not to Sue Agreement (this "Agreement") is made and entered into by and between the Office of the Attorney General (the "OAG"), on behalf of the Commonwealth of Massachusetts (the "Commonwealth") and Headwall Recovery Corporation ("Headwall") and Michael R. Harkins ("Harkins"). Collectively, the OAG, on behalf of the Commonwealth, Headwall, and Harkins will be hereinafter referred to as the "Parties."

B. This Agreement is entered into pursuant to the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, as amended, Massachusetts General Laws, Chapter 21E ("G.L. c. 21E") and the Massachusetts Contingency Plan, 310 CMR 40.0000, (the "MCP") and involves the remediation and redevelopment of 125 Manchester Street, Lowell, MA (the "Manchester Street Project").

C. It is the intent of the Parties entering into this Agreement to set forth herein their respective duties, obligations and understanding so that the Project can contribute to the physical and economic revitalization of an area of Lowell, MA. To that end, the Parties hereby agree that this Agreement, pursuant to G.L. c. 21E, §3A(j)(3), addresses potential claims by the Commonwealth as to Headwall and Harkins and is predicated upon their compliance with the terms and conditions of this Agreement. This Agreement also addresses potential claims brought by third parties for contribution, response action costs or property damage pursuant to G.L. c. 21E, §§ 4 and 5 or for property damage under common law, except for liability arising under a contract.

D. The Parties agree that Headwall and Harkin's ability to conduct the Manchester Street Project, as proposed herein, may be contingent upon independent approval processes of other departments, agencies and instrumentalities of the federal, state and local governments. Nothing in this Agreement should be construed as an endorsement by the OAG of the proposed project for such approval processes.

E. The Commonwealth believes that this Agreement is fair, consistent with G.L. c. 21E and in the public interest, and has entered into this Agreement as part of an effort to revitalize an area of Lowell, MA.



## II. THE PARTIES

A. The OAG is a duly constituted agency of the Commonwealth of Massachusetts charged with the legal representation of the Commonwealth and maintains offices at 200 Portland Street, Boston, Massachusetts. Included within the OAG's authority is the authority to enter into Brownfields Covenants Not to Sue Agreements pursuant to G.L. c. 21E, §3A(j)(3), which provides liability relief under G.L. c. 21E, as amended.

B. Headwall is a corporation, duly organized and existing pursuant to the general laws of the Commonwealth of Massachusetts located at 26 Chestnut Street, Andover, MA. Harkins is an individual also located at 26 Chestnut Street, Andover, MA. In accordance with this Agreement, Headwall and Harkins shall undertake the Project as discussed in Section IV, Paragraph A, subparagraph 2., below.

## III. STATEMENT OF FACT AND LAW

A. The Commonwealth enters into this Agreement pursuant to its authority under G.L. c. 21E, §3A(j)(3) and 940 CMR 23.00: Brownfields Covenants Not to Sue Agreements.

B. Unless otherwise expressly provided herein, terms used in this Agreement, which are defined in 940 CMR 23.00, *et seq.*, shall have the meaning assigned to them under such regulations. Terms not defined in 940 CMR 23.00, *et seq.*, but defined elsewhere under G.L. c. 21E and the MCP, shall have the meaning assigned to them under G.L. c. 21E and the MCP.

C. The Project involves approximately 35,000 sq. ft. parcel located at 125 Manchester Street (Front and Read), between Quebec Street and Gorham Street, including (i) a strip of land formerly used as a bed for railroad tracks, formerly owned by Boston & Maine Corp., and currently owned by Headwall (the "Railroad parcel"); and (ii) a parcel formerly used as an oil depot (Marchand Oil) (the "Broome parcel"). See Book 11116, pg. 250 for Railroad parcel, Middlesex North District Registry of Deeds; Book 7332, pg. 193 for the Broome parcel, Middlesex North District Registry of Deeds. Oil and/or hazardous materials have been detected on this parcel located at 125 Manchester Street. The Property is further depicted in Exhibit 1, attached hereto and incorporated into this Agreement.

D. The Department of Environmental Protection ("DEP") assigned release tracking number ("RTN") 3-20194 to the releases of oil and/or hazardous material released on the Property. For purposes of this Agreement, the releases of oil and/or hazardous material assigned RTN 3-20194 constitute the "Site," as further defined in 310 CMR 40.0006.



#### IV. COMMITMENTS AND OBLIGATIONS

NOW THEREFORE, in consideration of the representations made and promises exchanged by and between the Parties, each of them does hereby covenant and agree to the terms and conditions which follow.

##### A. REPRESENTATIONS AND COMMITMENTS

###### 1. By Headwall and Harkins

Headwall and Harkins represent that they are not at the time of execution of this Agreement a person with potential liability for the Site pursuant to G.L. c. 21E. Headwall and Harkins further represent that they are not now nor have they ever been previously affiliated with any person having such potential liability at the Site, except as set forth below. Thus, Headwall and Harkins represent that they are Eligible Persons. Headwall and Harkins also represent, and, for the purposes of this Agreement, the Commonwealth relies upon those representations, that Headwall and Harkins's involvement with the Site has been limited to the following:

- a. Evaluating the Property for purposes of acquiring the Property;
- b. Negotiating to acquire and acquiring the Property; and
- c. Communicating with the Commonwealth and local authorities with respect to the design and planning of improvement projects and various permitting issues with respect to the Property. Headwall and Harkins represent that none of these activities has caused or contributed to the release or threatened release of a oil and/or hazardous material at the Site under G.L. c. 21E.

###### 2. Headwall and Harkins agree to the following terms and conditions:

a. Headwall and Harkins shall subdivide the Property into at least six residential lots and shall construct single and two-family residences on each such lot, thus creating a total of between six and twelve residential units. Between 25% and 33% of the residential units shall be sold for an amount which meets state and local standards for affordable housing. Specifically, if nine or more residential units are sold, at least three shall qualify as affordable housing, but if less than nine units are sold, at least two shall qualify. A copy of Headwall and Harkins's proposed conceptual plan is attached as Exhibit 2.

b. Headwall and Harkins shall return the Site to compliance with the MCP by submitting either a Phase I Initial Site Investigation Report and a Tier Classification Submittal, or a Response Action Outcome Statement to DEP by March 31, 2004. Headwall and Harkins shall achieve and maintain a permanent solution at the Site, without the use of an Activities and Use Limitation, in accordance with G.L. c. 21E and the MCP. Headwall and



Harkins shall cooperate fully with DEP. To cooperate fully means:

- i. including, without limitation, providing prompt and reasonable access to the Property to DEP for any purpose consistent with G.L. c. 21E and the MCP;
- ii. complying with the release notification provisions established by G.L. c. 21E and the MCP;
- iii. responding in a timely manner to any request made by the DEP or OAG to produce information as required pursuant to G.L. c. 21E;
- iv. to the extent necessary (a) preventing the exposure of people to oil and/or hazardous material by fencing or otherwise preventing access to the Property; and (b) to containing any further release or threat of release of oil and/or hazardous material from a structure or container, upon obtaining knowledge of a release or threat of release of oil and/or hazardous material; and
- v. conducting response actions at the Site in accordance with the G.L. c 21E, the standard of care defined therein, and the MCP.

3. Headwall and Harkins are not at the time of execution of this Agreement subject to any outstanding administrative or judicial environmental enforcement action arising under any applicable federal, state or local law or regulation.

## B. THE BROWNFIELDS COVENANT NOT TO SUE

### 1. Headwall and Harkins

In consideration of the Representations and Commitments by Headwall and Harkins set forth in Section IV, Paragraph A of this Agreement, and subject to Headwall and Harkins' compliance with the terms and conditions of this Agreement and the Termination for Cause provisions, described below in Section IV, Paragraph B, subparagraph 6, the Commonwealth covenants not to sue Headwall and Harkins, pursuant to G.L. c. 21E, for response action costs, contribution, or injunctive relief for the Matters Addressed at the Property Addressed by this Agreement. This Covenant shall vest on the effective date of this Agreement as defined in Section IV, Paragraph E, subparagraph 5. This Agreement shall not affect any liability established by contract. For purposes of this Agreement, the Property Addressed shall be the Site as defined in Section III, Paragraph D, and the Matters Addressed shall be defined as those releases of oil and/or hazardous material at the Site which are fully described and delineated in the Response Action Outcome ("RAO") statement to be submitted to DEP with respect to the Site, so long as the response actions upon which the RAO relies meet the Standard of Care in effect as of the time of submittal of the RAO.



2. Subsequent Owners and/or Operators

The Commonwealth also covenants not to sue Eligible Persons who are successors, assigns, lessees or licensees of the real property interests of Headwall and Harkins, or who are lessees or licensees of its successors and assigns (hereinafter the "Subsequent Owners and/or Operators") having rights in the Property for which Headwall and Harkins receive covenants herein, with respect to the Matters Addressed at the Property Addressed, as described in Section IV, Paragraph B, subparagraph 1 and 2, above. The liability relief available to such Subsequent Owner and/or Operator shall be subject to the same terms and conditions as those that apply to Headwall and Harkins.

3. Duration of the Agreement

With respect to Headwall and Harkins, this Agreement shall be in effect unless and until the statutory protections available to Headwall and Harkins or Subsequent Owners and/or Operators pursuant to G.L. c.21E, §5C, are otherwise in effect. This Agreement is subject to the Termination for Cause provisions, described below in Section IV, Paragraph B, subparagraph 5.

4. Reservations of Rights

The Brownfields Covenant Not to Sue shall not apply to the following:

- a. any new release of oil and/or hazardous material at, or from the Property that occurs after the date of execution of this Agreement;
- b. any release of oil and/or hazardous material which Headwall and Harkins, or any Subsequent Owner and/or Operator, causes or contributes to or causes to become worse than it otherwise would have been had Headwall and Harkins or any Subsequent Owner and/or Operator not engaged in such activities;
- c. any release of oil and/or hazardous material at the Site that has not been discovered as of the time of submittal of the RAO to DEP that could have been discovered had an assessment of the Site covered by or addressed in the RAO been performed consistent with the Standard of Care, in effect as of the time of submittal of the RAO;
- d. any release or threat of release of oil and/or hazardous material from which there is a new exposure that results from any action or failure to act pursuant to G.L. 21E during Headwall's, Harkins's, or Subsequent Owners's and/or Operators's ownership or operation of the Property;
- e. any release of oil and/or hazardous material not expressly described in Section IV, Paragraph B above and



f. any claims for damages for injury to, destruction of, or loss of natural resources and for the costs of any natural resource damage assessment.

5. Termination for Cause

a. In the event that the OAG or DEP determine that Headwall and Harkins submitted materially false or misleading information as part of its Application to Enter into a Brownfields Covenant Not to Sue Agreement, the OAG may terminate the liability protection offered by this Agreement in accordance with subparagraph 5.d. of this Section IV, below. A statement made by Headwall and Harkins regarding the anticipated benefits or impacts of the proposed project will not be considered false or misleading for purposes of this subparagraph, if such statement was asserted in good faith at the time it was made.

b. In the event that the OAG or DEP determine that Headwall and Harkins or a Subsequent Owner and/or Operator has violated the terms and conditions of this Agreement, including but not limited to, failure to achieve and maintain the permanent solution at the Site, failure to respond in a timely manner to a Notice of Audit Finding requiring additional work to achieve and/or maintain a permanent solution at the Site, the OAG may terminate the liability protection offered by this Agreement in accordance with subparagraph 5.c., below. In the event that the liability protection is terminated solely because of a violation of one or more of the conditions set forth in 940 CMR 23.08(3)(a) through (d) by a Subsequent Owner and/or Operator, such termination shall affect the liability protection applicable only to such Subsequent Owner and/or Operator.

c. Before terminating the liability relief provided by this Agreement, the OAG will provide Headwall and Harkins or a Subsequent Owner and/or Operator, as appropriate, with written notice of the proposed basis for, and a 60-day opportunity to comment on, the proposed termination. The notice from the OAG may provide a reasonable period of time for Headwall and Harkins or Subsequent Owner and/or Operator, as appropriate, to cure an ongoing violation in lieu of termination of the liability relief provided by this Agreement in the sole discretion of the OAG.

d. Termination of liability relief pursuant to this section shall not affect any defense that Headwall and Harkins or a Subsequent Owner and/or Operator might otherwise have pursuant to G.L. c. 21E.

C. COVENANT NOT TO SUE BY HEADWALL AND HARKINS OR  
SUBSEQUENT OWNER AND/OR OPERATOR

In consideration of the Brownfields Covenant Not to Sue in Section IV, Paragraph B of this Agreement, Headwall and Harkins or a Subsequent Owner and/or Operator hereby covenant not to sue and not to assert any claims or causes of action against the Commonwealth, including any department, agency, or instrumentality, and its authorized officers, employees, or



representatives with respect to the Site or this Agreement, including but not limited to:

1. any direct or indirect claims for reimbursement, recovery, injunctive relief, contribution or equitable share of response costs or for property damage pursuant to G.L. c. 21E;
2. any claims under the Fifth Amendment to the United States Constitution or under the Massachusetts Constitution for "takings";
3. any claims arising out of response actions at the Property, including claims based on DEP's selection of response actions, oversight of response actions, or approval of plans for such activities;
4. any claims or causes of action for interference with contracts, business relations or economic advantage; or
5. any claims for costs, attorneys fees, other fees or expenses incurred.

D. CONTRIBUTION PROTECTION AND RIGHTS OF AFFECTED THIRD PARTIES

With regard to claims for contribution, cost recovery or equitable share brought by third parties pursuant to G.L. c. 21E, §§ 4 and 5, or third party claims brought pursuant to G.L. c. 21E for property damage claims under common law or G.L. c. 21E, §5, against Headwall and Harkins or a Subsequent Owner and/or Operator, based solely on the their status as owner or operator of the Site, the Commonwealth and Headwall and Harkins agree that they or a Subsequent Owner and/or Operator are entitled to such protection from such actions or claims as provided by G.L. c. 21E for the Matters Addressed at the Property Addressed; provided, however:

1. that Headwall and Harkins have satisfied the notification provisions of G.L. c. 21E, §3A(j)(3) and 940 CMR 23.06(1);
2. that the OAG has made its determination regarding the nature and extent of the opportunity that Affected Third Parties will have to join this Agreement pursuant to 940 CMR 23.06(3); and
3. that the OAG has provided Affected Third Parties an appropriate opportunity to join this Agreement pursuant to 940 CMR 23.06(2) and (3).

E. GENERAL PROVISIONS

1. This Agreement may be modified only upon the written consent of all Parties.

2. Should any term or condition of this Agreement or its application to any person or circumstance be found to be unenforceable by any court of competent jurisdiction, the remainder of this Agreement shall not be affected and each remaining term and provision shall be valid and enforceable to the full extent permitted by law.

3. Each Party warrants and represents to the others that it has the authority to enter into this Agreement and to carry out its terms and conditions.

4. This Agreement may be fully executed by all Parties in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument.

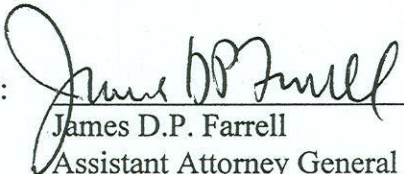
5. The terms of this Agreement in Section IV, Paragraph B, subparagraph 1, with respect to the Covenant Not to Sue and Section IV, Paragraph D, with respect to the Contribution Protection and Rights of Affected Third Parties for Headwall and Harkins, shall be effective as of the date the OAG executes this Agreement, subject to the conditions contained herein.

IT IS SO AGREED:

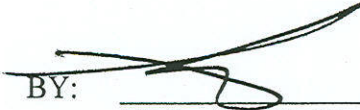
OFFICE OF THE ATTORNEY GENERAL

HEADWALL RECOVERY  
CORPORATION AND MICHAEL R.  
HARKINS

BY:

  
James D.P. Farrell  
Assistant Attorney General  
Brownfields Unit Chief  
Environmental Protection Division  
Office of the Attorney General  
200 Portland Street  
Boston, MA 02114

BY:

  
Michael R. Harkins  
26 Chestnut Street  
Andover MA 01810

Date:

2/5/04

Date:

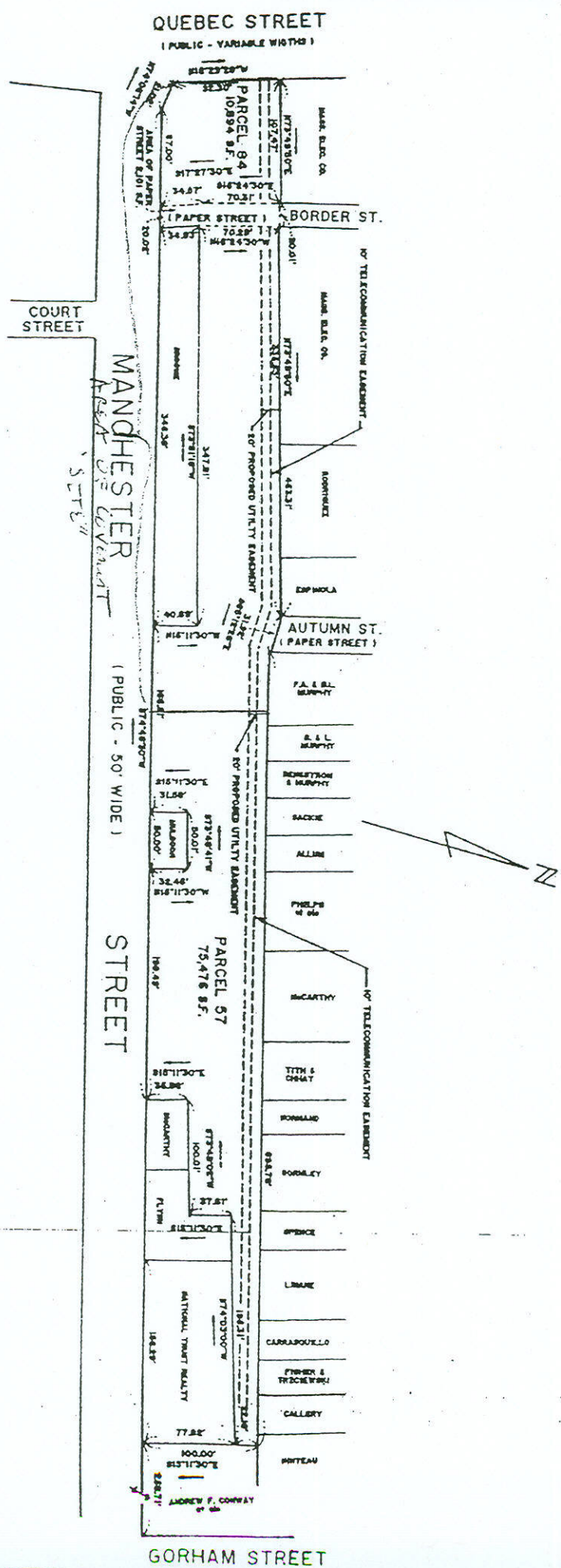
5 Jan 04



## **EXHIBIT 1**



- NOTES:
- 1. TOWNING DISTRICT: 1F - TWO FAMILY DWELLINGS
  - 2. RECORD OWNER: BOSTON & MAINE CORPORATION
  - 3. BEING AND INTENDING TO BE THE REMAINING LAND CURRENTLY OWNED BY THE BOSTON & MAINE CORPORATION AS SHOWN ON THEIR PLAN V.B. 3 / MAP 88-84843 AND PLAN BOOK 37 PLAN 23
  - PLAN REFERENCES RECORDED AT THE MAPS: 7/11, 37/23, 189/138, 187/23, AND 197/48 ALSO LOWELL ASSESSORS MAP 165



I HEREBY CERTIFY THAT THE PROPERTY LINES SHOWN ON THIS PLAN ARE THE LINES DIVIDING EXISTING OWNERSHIP, AND THE LINES OF THE LOTS AND THOSE OF PUBLIC OR PRIVATE OWNERSHIP, AND THAT THE LINES SHOWN ON THIS PLAN ARE THE LINES OF DIVISION OF EXISTING OWNERSHIP OR FOR NEW WAYS ARE SHOWN.

ROBERT M. GILL  
P.E./R.L.S.

I HEREBY CERTIFY THAT THIS PLAN CONFORMS TO THE RULES OF THE REGISTRY OF DEEDS.

ROBERT M. GILL  
P.E./R.L.S.

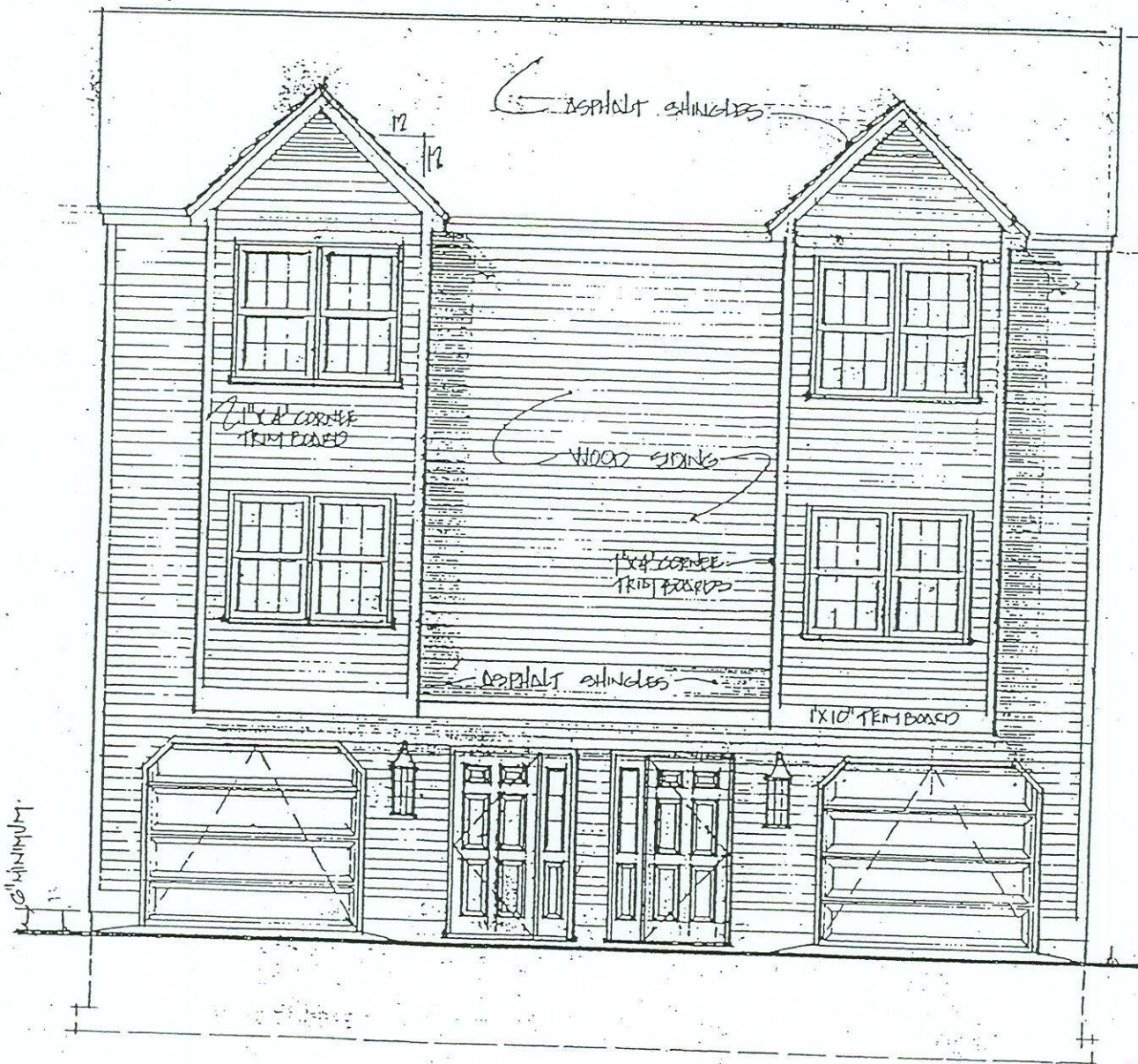


LAND IN  
**LOWELL, MA**  
TO  
**BOSTON & MAINE CORPORATION**  
**HEADWALL RECOVERY CORPORATION**  
SCALE: 1" = 60'  
SEPT. 27, 2000  
ROBERT M. GILL & ASSOCIATES, INC.  
CIVIL ENGINEERS & LAND SURVEYORS  
418 BRIDGE ST. LOWELL, MA. 01850



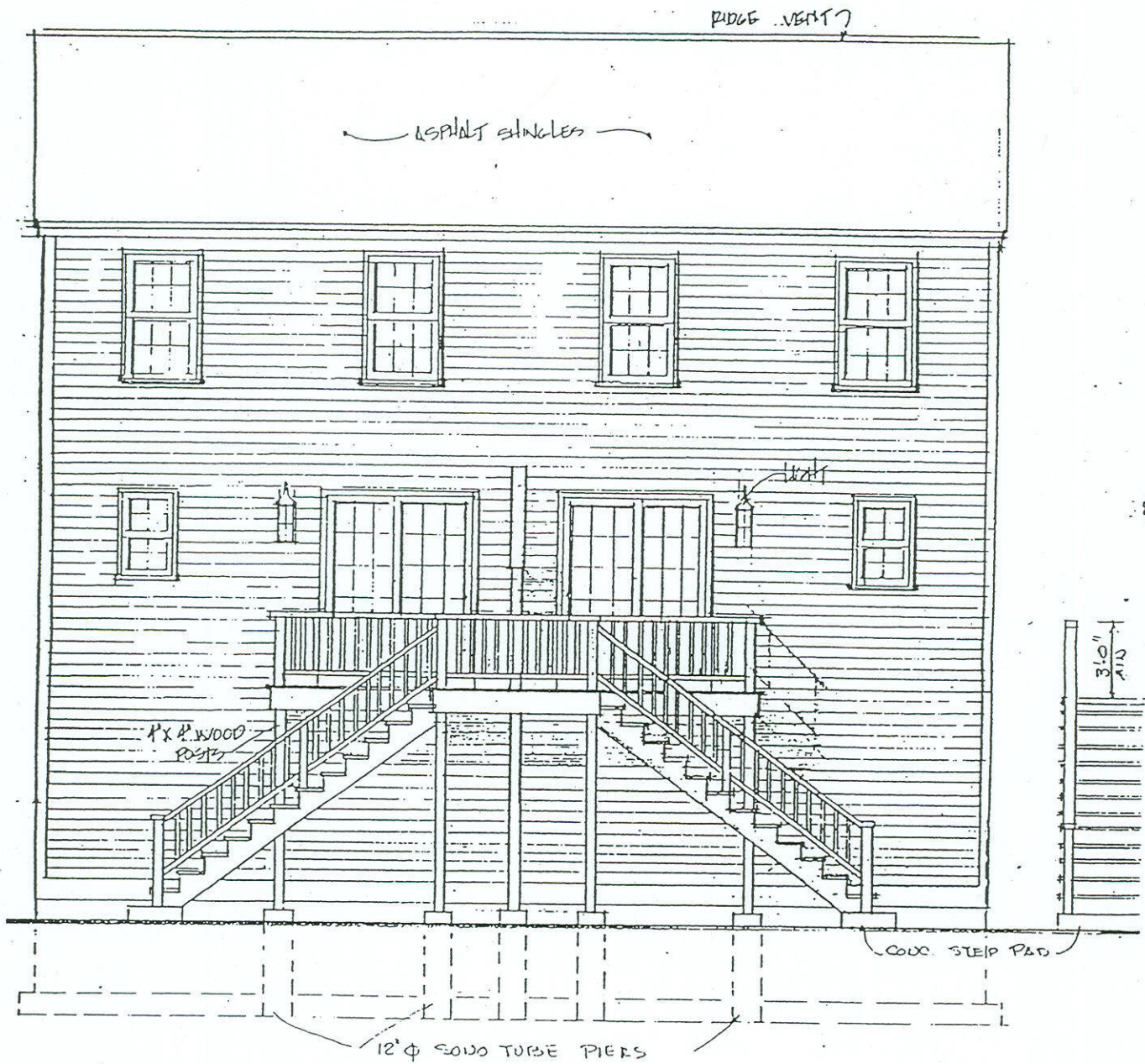
## **EXHIBIT 2**





FRONT ELEVATION





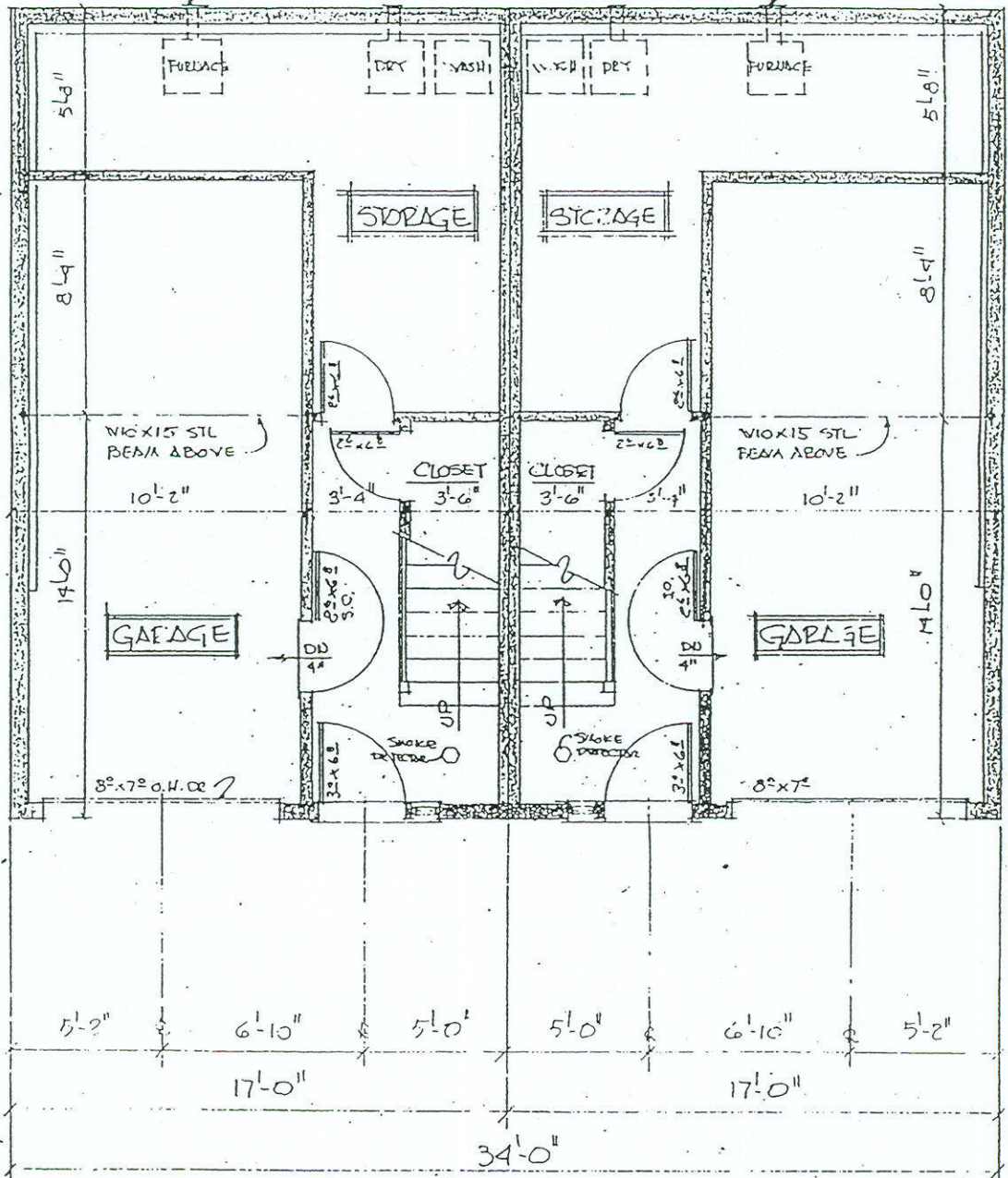
REAR ELEVATION

M. GILL & ASSOCIATES INC.  
MASSACHUSETTS

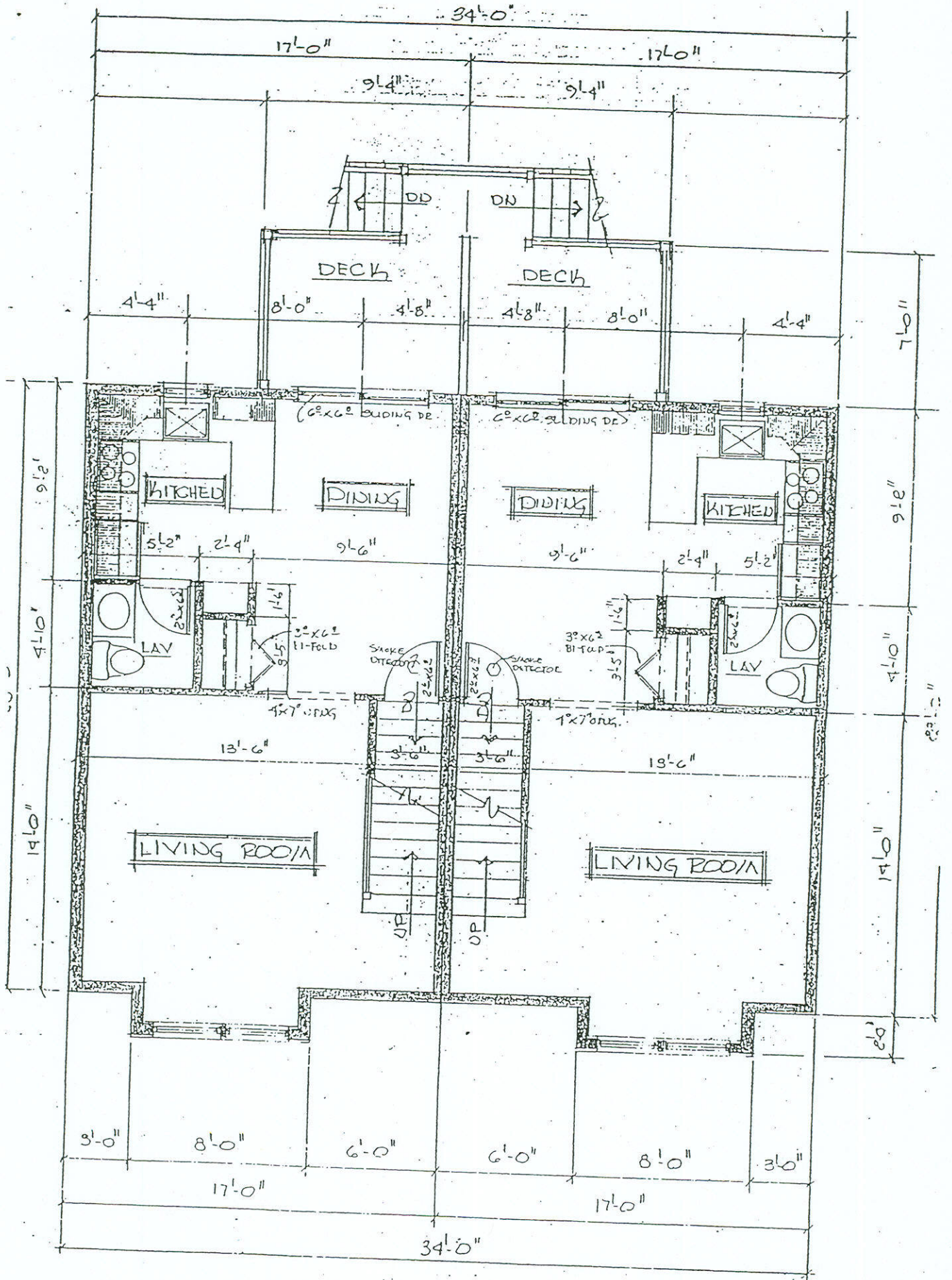




NOTE: PROVIDE DIRECT THRU-WALL VENTING FOR ALL FURNACES & DETEC. TYPICAL

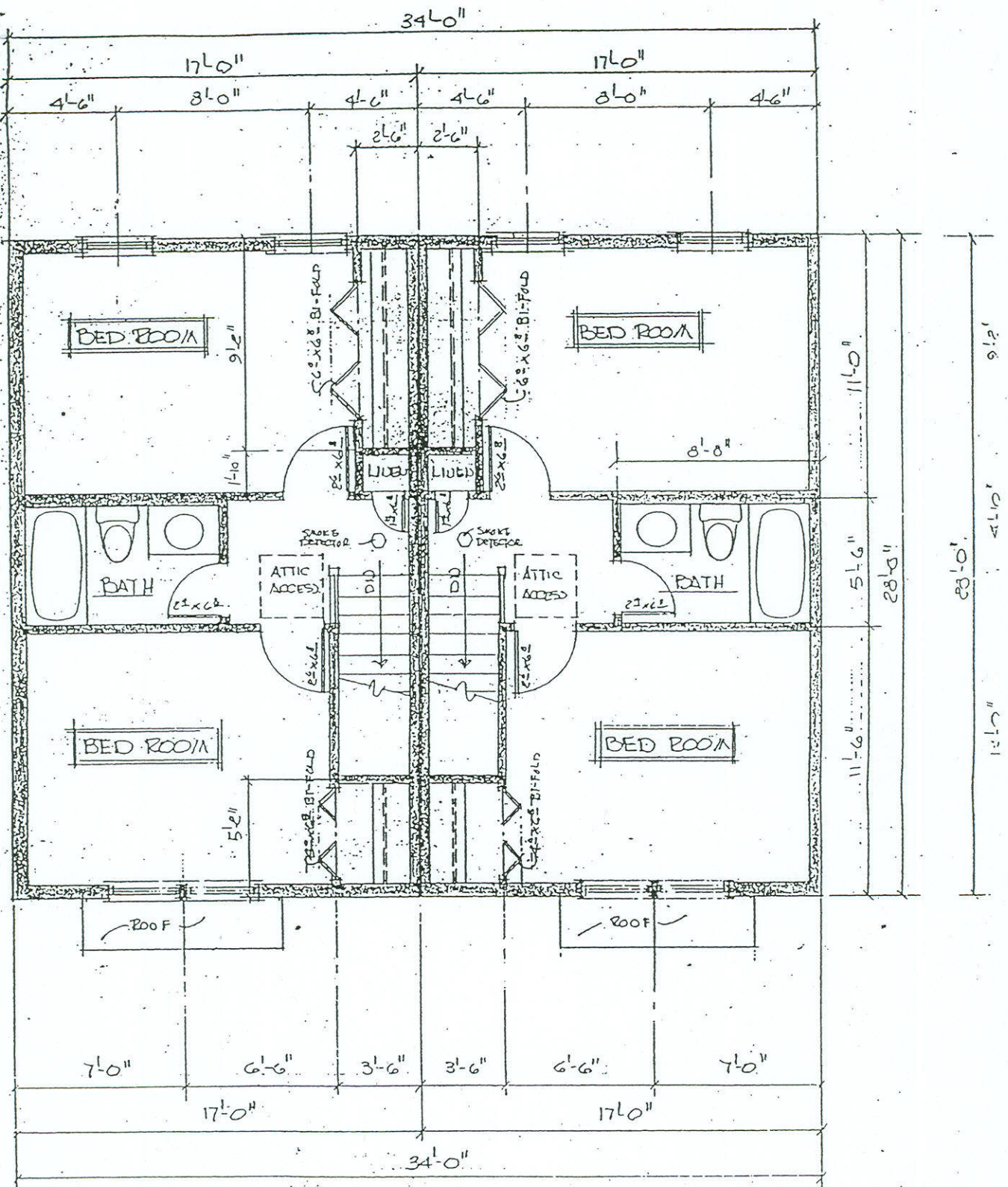






FIRST FLOOR PLAN





SECOND FLOOR PLAN